IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

FRIDAY, THE 25TH MAY 2007 / 4TH JYAISHTA 1929

MFA.No. 786 of 1994()

WCC.404/1993 of W.C.C.,KOZHIKODE
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APPELLANT - OPPOSITE PARTY :

K. APPUKKUTTAN NAIR, P.W.D. CONTRACTOR,
AMBIKALAYAM, KARANTHUR,
CHELAVOOR P.O.,
KOZHIKODE DISTRICT.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS - APPLICANT :
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1. **T.K. SUBAIDA, ALUMTHARAKKAL,**
NEELESWARAM P.O., KODUVALLY.

2. **DEPUTY LABOUR COMMISSIONER**
AND COMMISSIONER FOR WORKMENS
COMPENSATION, KOZHIKODE.

BY ADVOCATE SHRI MANJU ANTONY R1
BY GOVERNMENT PLEADER SHRI L.G. SURESH BABU R2

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 25/05/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P. NO. 3239 OF 1994 IN

M.F.A. NO. 786 OF 1994

DISMISSED.

25.5.2007 **ID/- K. PADMANABHAN NAIR, JUDGE.**

K. PADMANABHAN NAIR, J.

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M.F.A. NO. 786 OF 1994

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Dated this the 25th day of May, 2007

J U D G M E N T

Respondent in W.C.C. No.404 of 1993 on the file of the Deputy Labour Commissioner and Commissioner for Workmen's Compensation, Kozhikode is the appellant. Appeal is filed challenging an order passed by the Deputy Labour Commissioner awarding an amount of Rs.87,980/- with 6% interest from the date of the accident.

2. Though notice was issued to the first respondent on several occasions, she did not appear and contest the matter. Hence the High Court Legal Services Committee appointed Advocate Shri Manju Antony as the counsel for the first respondent. Appeal is disposed of after hearing the counsel on both sides.

3. The proceedings has got a checkered career. One Beeran, who was sleeping in a shed near to a building (Cinema Theatre) under construction. On that day there was heavy rain and wind. On account of the rain and wind, the wall of the building under construction fell down causing the death of

Beeran. First respondent, the widow of the deceased, filed W.C.C. No.404 of 1993 claiming compensation on account of the death of her husband. It was averred that after the normal work her husband was working as a Watcher and he died due to the collapse of the wall of the building under construction while discharging his duties. It was also averred that her husband used to get upto Rs.1,000/- as salary.

4. Initially, the Deputy Labour Commissioner dismissed the application holding that the deceased was not a workman. Challenging that order, the 1st respondent filed M.F.A. No.175 of 1985 before this Court. A Division Bench of this Court allowed the appeal, set aside the order passed by the Deputy Labour Commissioner and remanded the matter. While disposing of the appeal it was made clear that it was not open to the appellant, who was the first respondent therein, to contend that deceased Beeran was not a workman by virtue of Clause (viii) of Schedule II of the Workmen's Compensation Act.

5. After remand, the applicant did not appear before the Deputy Labour Commissioner and her lawyer reported no instructions. No argument was seen advanced by the counsel

for the applicant or employer also. The Deputy Labour Commissioner passed an order holding that the deceased was a workman and found that the applicant was entitled to get an amount of Rs.87,980/- as compensation. Challenging that order, this appeal is filed by the respondent in the application.

6. Learned counsel for the appellant has argued that the order passed by the Deputy Labour Commissioner is perverse and illegal. It is argued that the claimant had claimed only Rs.40,000/- towards compensation in the application. But the Deputy Labour Commissioner awarded a sum of Rs.87,980/-. It is contended that when the applicant limits his/her claim, the Deputy Labour Commissioner cannot award any amount in excess of that amount. It was also contended that the deceased, going by the evidence adduced by the parties, was not a workman at the relevant time. It is argued that the accident occurred on 21.7.1982 and at the relevant time the deceased was only a casual labourer and not a workman under the Act.

7. Before amendment of the Act, 'Workman' is defined as follows:

> "Workman" means any person other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is-
>
> (i) xxxxxxxxxx
>
> (ia) xxxxxxxxxx
>
> (ii) employed in anfy such capacity as is specified in Schedule II".

8. It is argued that the definition of Workman was amended in the year 2000 by which casual labourers were also included in the purview of the Act. The income limit was also deleted. It is also argued that the evidence of P.W.2, who is an independent witness, will prove beyond any reasonable doubt that the deceased was not a workman. He was a construction worker and the accident did not occur while he was working as mason. It is argued that the incident happened at midnight and at that time he was discharging the duties of night watchman which was of casual nature. It was argued that even the first respondent-applicant had admitted that the deceased was a construction worker and he was employed only very rarerly as watcher.

9. Learned counsel for the first respondent submitted that initially the application was dismissed and challenging

that order M.F.A.No.175 of 1985 was filed before this Court. In that case this Court found that the deceased was a workman. It was also found that the appellant herein was not entitled to raise a contention that the deceased was not a workman.

10. It is seen that the Deputy Labour Commissioner also proceeded with the assumption that in view of the finding of this Court in the earlier MFA it is not open to the appellant to contend that the deceased was not his workman. Shri T.G. Rajendran, learned counsel appearing for the appellant argued that the question that deceased Beeran was not a workman by virtue of clause (viii) of Schedule II of the Act alone was considered and the finding was that the appellant is not entitled to raise a contention that the deceased was not his workman by virtue of Clause (viii) of Schedule II of the Act.

11. The relevant finding of this Court in M.F.A. No.175 of 1985 is as follows:

> "We make it clear that it is not open to the first respondent to contend that Beeran was not a workman by virtue of Clause viii of Schedule II of the Act".

12. In fact there was no finding in the earlier MFA that

the deceased was a workman as defined under Section 2 of the Act. I am of the view that whether that contention is barred by constructive res judicata is a matter to be decided by the Deputy Labour Commissioner. The further question to be considered is whether the Deputy Labour Commissioner can award a higher amount than what a party entitled to get. In the application, the applicant claimed only Rs.40,000/-, though she was entitled to get more than Rs.80,000/- even on that day. So whether the Deputy Labour Commissioner has got power to award an amount in excess of what is claimed is also a matter to be considered by the Deputy Labour Commissioner.

13. Learned counsel for the first respondent has raised a contention that since the Act is a beneficial legislation and the general law regarding pleadings and proof is not applicable in the case of this nature the Deputy Labour Commissioner can award whatever amount legally due to the applicant. As I have already stated that the case was disposed of by the Deputy Labour Commissioner without hearing the applicant and employer. Considering all aspects of the matter, it is only just and proper that the appellant is given another

opportunity to establish the case. It is also to be noted that the amount initially awarded was deposited long back and the 1st respondent has not appeared before the Deputy Labour Commissioner claiming that amount.

In the result, the appeal is allowed. The impugned order is set aside. The matter is remanded to the Deputy Labour Commissioner. The Deputy Labour Commissioner is directed to take back W.C.C. No.404 of 1993 to file and dispose of the same afresh in accordance with law after giving both sides opportunity to adduce evidence, if so advised.

K. PADMANABHAN NAIR, JUDGE.

vsv

K. PADMANABHAN NAIR, J.

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M.F.A. NO. 786 OF 1994

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J U D G M E N T

25TH MAY, 2007